SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 756

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION FILM SALES, INC., NATIONAL BROADCASTING COMPANY, INC., CALIFORNIA NATIONAL PRODUCTIONS, INC., LOEW'S INCORPORATED, REPUBLIC PRODUCTIONS, INC., REPUBLIC PICTURES CORPORATION and HOLLYWOOD TELEVISION SERVICE, INC.,

Appellants,

vs.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE P. CARPENTER, RUSSELL A. CHEEVER, and HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

No. 757

RADIO CORPORATION OF AMERICA, COLUMBIA BROADCASTING SYSTEM, INC., CAPITOL RECORDS, INC., LOEW'S INCORPORATED, DECCA RECORDS, INC., and CORAL RECORDS, INC.,

Appellants,

vs.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER and GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated,

Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

HOMER I. MITCHELL,
CHARLES G. BAKALY, JR.,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Columbia Broadcasting System, Inc., CBS Television Film Sales, Inc., Radio Corporation of America, National Broadcasting Company, Inc., California National Productions, Inc., and Capitol Records, Inc.

O'MELVENY & MYERS,
Of Counsel.

ALFRED I. ROTHMAN,
523 West Sixth Street,
Los Angeles 14, California,
Attorney for Loew's Incorporated, Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television Service, Inc.

LOEB & LOEB,
Of Counsel.

AVERILL C. PASAROW,
325 West Eighth Street,
Los Angeles 14, California,
Attorney for Decca Records, Inc. and Coral Records, Inc.

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Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

These are appeals from final judgments of the Supreme Court of the State of California, entered in two original proceedings before it for writs of mandate, adjudging that under Section 412 of the California Code of Civil Procedure, the Superior Court of the State of California, in and for the County of Los Angeles, has jurisdiction over two actions by appellees against these appellants

and others and ordering said court to assume and exercise jurisdiction over applications by appellees for preliminary injunctions and for appointment of a receiver.*

Opinions Below.

The opinion and decision of the California Supreme Court is reported unofficially at 49 A. C. 339, 316 P. 2d 960, and a copy is appended hereto as Appendix A. The opinion of the District Court of Appeal (which has been superseded by the opinion of the California Supreme Court), will not be officially reported but is reported unofficially at 310 P. 2d 145. The memorandum opinion of the Superior Court for Los Angeles County in related proceedings entitled *Atkinson, et al. v. American Federation of Musicians; et al.*, and *Anderson, et al. v. American Federation of Musicians, et al.*, is unreported, but is appended hereto as Appendix B.

Jurisdiction.

The proceedings below were original proceedings for writs of mandate brought by appellees in the California Supreme Court pursuant to Sections 1084, 1085 and 1086 of the California Code of Civil Procedure (West's Ann. Cal. Codes, Code Civ. Proc., §§1084-1086) and Rule 56 of the California Rules on Appeal (36 Cal. 2d 41). The judgments of the California Supreme Court were entered on November 5, 1957 [App. A], and notices of appeal were filed in that court on December 3, 4 and 13, 1957. The jurisdiction of this Court is invoked under

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*This Jurisdictional Statement is filed on behalf of the appellants named in the caption. The American Federation of Musicians which has also appealed from the judgment below may be expected to file a separate Statement.

28 U. S. C. §1257(2). Cases believed to sustain the jurisdiction are, *e.g.*, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *Standard Oil Co. v. Johnson*, 316 U. S. 481, and *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, holding that a proper case for appeal is presented where the validity of a state statute, as construed and applied, is drawn in question on the ground of repugnancy to the Federal Constitution; and *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 14; *Detroit and M. R. Co. v. Michigan R. Comm'n*, 240 U. S. 564, 570-571, and *Rescue Army v. Municipal Court*, 331 U. S. 549, 566-567, holding that a judgment granting or denying an extraordinary writ is "final" despite the fact that it does not completely determine on the merits the underlying controversy between the parties or preclude further related proceedings between them. See pp. 7-9, *infra*.

Question Presented.

Is Section 412 of the California Code of Civil Procedure repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when such statute is construed and applied (as it was by the California Supreme Court) to authorize adjudication of the rights of a nonresident over whom it has no personal jurisdiction, in a California action brought against such nonresident, as trustee under a trust agreement and against trustors who were found and personally served in California, for the purpose of having it adjudged that such trust agreement is invalid and that the trustors are obligated to pay to plaintiffs the sums which they agreed to pay to the nonresident trustee and which he agreed to use for specified trust purposes?

Statutes Involved.

Sections 412, 413 and 417 of the California Code of Civil Procedure (Cal. Stat. 1951, ch. 1737, §48, ch. 43, §1, ch. 935, §1, West's Ann. Cal. Codes, Code Civ. Proc., §§412, 413, 417) are set forth in Appendix C hereto.

Statement of Facts.

These are appeals from final judgments of the California Supreme Court entered in two original proceedings before it for writs of mandate. The writs of mandate command the Superior Court for Los Angeles County to assume and exercise jurisdiction over applications by appellees for preliminary injunctions and appointment of a receiver in two actions entitled *Atkinson, et al. v. American Federation of Musicians, et al.* and *Anderson, et al. v. American Federation of Musicians, et al.* The Superior Court for Los Angeles County had refused to entertain appellees' applications on the ground that under the Due Process Clause of the Fourteenth Amendment it had no power to determine the rights of Samuel R. Rosenbaum, an indispensable party, in the absence of jurisdiction over his person.

The actions to which these proceedings for extraordinary writs relate were brought by appellees, on behalf of themselves and other musicians similarly situated, against the American Federation of Musicians, Samuel R. Rosenbaum, and a number of companies, including these appellants, which are engaged in the manufacturing of phonograph records (the *Anderson* case) or the licensing of theatrical motion pictures for use on television (the *Atkinson* case). In both actions it was alleged that the Federation had breached a duty, imposed upon it by

law as exclusive bargaining agent for musicians employed in the motion picture and recording industries, by causing the appellant companies to enter into certain agreements with Rosenbaum rather than to pay appellees additional amounts in the form of wages. The disputed agreements obligated appellants to pay large sums of money to Rosenbaum, as trustee, and obligated Rosenbaum to use such sums for the purpose of arranging and organizing free public performances by instrumental musicians in a manner calculated to contribute to public knowledge and appreciation of music. In both actions, the relief demanded is an adjudication that the agreements between appellants and Rosenbaum are invalid; that Rosenbaum has no interest in the payments described therein; and that the companies are obligated to pay appellees the amounts which they had agreed to pay Rosenbaum, as trustee, free of any obligation on the part of appellees to use the amounts for the specified purposes. Pending such an adjudication, each group of appellees sought an injunction forbidding the making of payments to the trustee, and the appointment of a receiver to collect and hold such payments.

Samuel R. Rosenbaum, a resident of New York, did not appear and was not personally served within the State of California. He was, however, served constructively under color of the authority granted in §412 of the California Code of Civil Procedure by delivery of a summons and copy of the complaint to him in New York. These appellants, who were personally served within the state, appeared in opposition to appellees' demands for a preliminary injunction and contended, *inter alia*, that Rosenbaum was an indispensable party to such actions;

that assumption by the court of jurisdiction to determine the rights of Rosenbaum and these appellants without personal jurisdiction over Rosenbaum would constitute a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; that if §412 of the Code of Civil Procedure should be construed to authorize such an assumption of jurisdiction it would be repugnant to the Fourteenth Amendment, and that the application should therefore be denied. In a memorandum opinion filed January 24, 1957 [App. B], the Superior Court for Los Angeles County indicated that it was prepared to sustain these appellants' contentions as to lack of jurisdiction and would issue an order denying appellees' applications.

Thereafter, appellees brought two proceedings in the appropriate California District Court of Appeal entitled *Atkinson, et al. v. Superior Court* and *Anderson, et al. v. Superior Court* for writs of mandate to compel the Superior Court for Los Angeles County to assume and exercise jurisdiction over their applications for preliminary injunctions and the appointment of a receiver. In accordance with Rule 56 of the California Rules on Appeal, the petitions for writs of mandate were served upon these appellants as real parties in interest. These appellants made returns by filing demurrers and in support thereof made the above stated contentions based on the Fourteenth Amendment. The District Court of Appeal rejected these contentions and gave judgment for appellees. 310 P. 2d 145. Subsequently, however, the California Supreme Court granted appellants' petition for hearing, a step which under California practice had the effect of vacating the opinion and judgment rendered in the

District Court of Appeal.* The proceedings in the California Supreme Court which followed were, therefore, in the nature of original proceedings brought by appellees rather than proceedings brought by appellants to secure appellate review of the adverse judgment of the District Court of Appeal.

In the California Supreme Court, appellants repeated the contentions set forth above, tendering for decision by their briefs and oral argument the issue, among others, of whether Section 412 of the California Code of Civil Procedure was repugnant to the Fourteenth Amendment if construed and applied to authorize assumption and exercise of jurisdiction over Rosenbaum and these appellants in the basic actions. By its judgments filed November 5, 1957, the court decided this issue adversely to appellants [App. A]. Thereafter it issued a writ of mandate in each case [App. D]. Appellants appealed to this Court by their notices of appeal filed December 3, 4 and 13, 1957.

This Court Has Jurisdiction of the Appeals.

A. The Federal Question Was Raised and Decided.

The validity of Section 412, California Code of Civil Procedure, as construed and applied, was "drawn in question" in the proceedings below not only by appellants but by the California Supreme Court. In its opinion, the court stated the issue before it as follows [App. A, pp. 4-5]:

> "Code of Civil Procedure Section 412 provides: 'Where the person on whom service is to be made

*See *Knouse v. Nimocks*, 8 Cal. 2d 482, 483-484, 66 P.2d 438, 438-439; *People v. Woods*, 19 Cal. App. 2d 556, 560, 65 P. 2d 940, 942.

> resides out of the State . . . and it . . . appears . . . that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person . . . from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons.' Section 413 provides that personal service outside the state is equivalent to publication. Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them instead of to the trustee. That obligation is a chose in action. . . . The question presented, therefore, is whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions."

The court then held that Section 412 was applicable in the circumstances before it, reviewed at length the decisions of this Court relating to the jurisdiction allowable to state courts under the Fourteenth Amendment, and decided in favor of the validity of Section 412 as thus applied [App. A]. Under the circumstances, it is clear that the decision below is reviewable by appeal under 28 U. S. C. §1257(2). See *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282; *May v. Anderson*, 345 U. S. 528; *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187.

B. The Judgments Below Were "Final" Within the Meaning of 28 U.S.C. Section 1257.

In *Rescue Army v. Municipal Court,* 331 U. S. 549, 565-566, this Court followed and confirmed a line of decisions extending over more than a century in holding that proceedings to obtain extraordinary writs are separate and distinct from the actions to which they relate, and that judgments entered in such proceedings are "final" regardless of whether further litigation in such other actions is contemplated. See *Weston v. Charleston,* 2 Pet. 448, 464; *Bandini Petroleum Co. v. Superior Court,* 284 U. S. 8, 14; *Detroit and M. R. Co. v. Michigan R. R. Comm'n,* 240 U. S. 564, 570-571. In the *Rescue Army* case, the Court went on to conclude for other reasons that its appellate jurisdiction should not be exercised in the circumstances there present. Because substantive constitutional issues of great scope and difficulty were involved; because the issues were posed abstractly, without any factual basis of record; and because it was not possible to determine with precision what issues were necessarily presented for decision, the Court concluded that the judgment lacked an element of ripeness requisite to Supreme Court review. The cases at bar, however, present no such obstacles to effective review. The legal issue presented for decision is narrow and unambiguous, and will not be clarified in any respect whatever by further litigation that may ensue between the parties to these appeals. All facts relevant to decision appear of record. Accordingly, under *Rescue Army* as well as the decisions there reviewed and confirmed, the judgments below are "final" and these appeals fall squarely within the obligatory jurisdiction of this Court.

C. Appellants Have Standing to Raise the Question Presented.

The question presented on these appeals is whether, under the Due Process Clause of the Fourteenth Amendment, Section 412 of the California Code of Civil Procedure is unconstitutional as applied in these cases. If Section 412 is unconstitutional, Rosenbaum, the defendant trustee, is not before the California court in the basic actions. In the absence of jurisdiction to determine Rosenbaum's rights, a judgment of the California court requiring these appellants to make the contractual payments to appellees rather than to Rosenbaum would not be entitled to full faith and credit in the courts of other states. See *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518. Such a judgment would not, therefore, protect these appellants against being compelled to pay the same obligation a second time under a judgment in an action in another state, brought by Rosenbaum, that he, rather than appellees, was entitled to receive the contractual payments from these appellants.

Under state law, Rosenbaum is an indispensable party to the basic actions so far as any relief against these appellants is concerned, and without first having obtained jurisdiction over Rosenbaum the California court has no jurisdiction to proceed against these appellants.* Moreover, as a matter of federal constitutional law, Rosenbaum

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*See, generally, *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P. 2d 1163; *Bank of California v. Superior Court*, 16 Cal. 2d 516, 522, 106 P. 2d 879, 883-884; *Younger v. Jordan*, 42 Cal. 2d 757, 269 P. 2d 616; *Willis v. Lauridson*, 161 Cal. 106, 117, 118 Pac. 530; and the memorandum of the Superior Court for Los Angeles County in the basic actions [App. B].

is an indispensable party so far as any relief against these appellants is concerned, for to allow the California court to compel payment by appellants under a judgment not entitled to full faith and credit elsewhere would constitute a denial of due process of law in violation of the Fourteenth Amendment.* See *Standard Oil Co. v. New Jersey,* 341 U. S. 428, 431.

Under the circumstances presented here, a decision as to the constitutionality of Section 412 of the California Code of Civil Procedure will necessarily be dispositive of the rights of appellants in these proceedings, and appellants therefore have standing to prosecute these appeals. *Cf. Pierce v. Society of Sisters,* 268 U. S. 510; *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229; *Truax v. Raich,* 239 U. S. 33.

D. The Appeals Are Not Moot.

Suggestions of possible mootness may be made in these cases by reason of the following events which have occurred since the entry of the judgments below: (1) In obedience to the judgments from which these appeals are taken, which have not been stayed, the Superior Court for Los Angeles County has entertained the applications for preliminary injunctions and appointment of a receiver to which these proceedings for extraordinary writs relate; and (2) the trial court has denied appellees' application for preliminary relief in one of the two cases (*Atkinson,*

*Under such cases as *Siler v. Louisville & N. R. Co.,* 213 U. S. 175, this Court need not consider whether Rosenbaum is an indispensable party to these proceedings as a matter of federal constitutional law, since state law furnishes adequate support for that conclusion. The jurisdiction of this Court is not affected if the existence of the right for which constitutional protection is claimed depends upon state law. *Fox River Paper Co. v. Railroad Commission,* 274 U. S. 651, 654.

et al. v. American Federation of Musicians, et al.), and granted it in the other (*Anderson, et al. v. American Federation of Musicians, et al.*). Appellants believe, however, that no substantial problem of mootness is presented.

The only basis for a suggestion of mootness would be the familiar rule that an appeal is moot when the act which is sought to be compelled or prevented has already occurred. See *Brownlow v. Schwartz,* 261 U. S. 216; *Richardson v. McChesney,* 218 U. S. 487; *Shub v. Simpson,* 340 U. S. 861, 340 U. S. 881; Stern & Gressman, Supreme Court Practice, pp. 208, 362 (2d ed. 1954). That rule applies, however, only when the act involved has been completely and "irretrievably" performed and "the nature of the case is such that reversal by the Supreme Court could have no effect." *Ibid.*; see *Porter v. Lee,* 328 U. S. 246, 251; *O'Hara v. MacConnell,* 93 U. S. 150, 154. In neither of the cases at bar has the trial court "completely" or "irretrievably" exercised its purported jurisdiction to grant or deny preliminary injunctive relief to appellees pursuant to the judgments from which these appeals are taken. In the *Atkinson* case, the trial court has denied plaintiffs' application for preliminary relief, but continues to have the power and duty to grant it in the event plaintiffs should be successful on any appeal which they may take from the court's order denying such relief or in the event plaintiffs should make an appropriate showing upon another application filed before a final judgment on the merits is rendered. In the *Anderson* case, preliminary relief has actually been granted, and the trial court has expressly retained jurisdiction with a view to dissolving its order in the event that this Court should reverse the judgment below. Under the circumstances, it is clear that a decision by

this Court would have an immediate and decisive effect upon the subject matter of this appeal, and therefore that the appeal is not moot. *Cf. Porter v. Lee, supra; Dakota County v. Glidden,* 113 U. S. 222, 224.

Moreover, the judgments below adjudicate more than the narrow issue of whether the Superior Court for Los Angeles County has jurisdiction to entertain applications for preliminary relief. They adjudge that Section 412 of the California Code of Civil Procedure is constitutional as applied in the basic actions, and hence that the Superior Court has jurisdiction in all respects to adjudicate the rights of Rosenbaum and these appellants.

In these circumstances, the appeals herein will not become moot at least until a final judgment is entered in the basic actions,* *cf. Sterling v. Constantin,* 287 U. S. 378, 386, and probably not then. See *Male v. Atchison, T. & S. F. R. Co.,* 240 U. S. 97; *Rio Grande Western R. Co. v. Stringham,* 239 U. S. 44.

In the event that this Court should conclude that either of these appeals is moot, it should vacate the appropriate judgment below and remand the cause to the California Supreme Court for further proceedings. *Natural Milk Producers v. San Francisco,* 317 U. S. 423; *Riley v. International Brotherhood of Teamsters,* 336 U. S. 930; compare *United States v. Munsingwear,* 340 U. S. 36,

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*Should this Court note probable jurisdiction, the Superior Court for Los Angeles County will undoubtedly refrain from entering a final judgment pending this Court's disposition of these appeals. If necessary, an application to stay entry of final judgment will be made in the California Supreme Court, and, if it should be denied, then in this Court. It is not expected that any decision on the merits will be reached by the trial court before this Court acts upon this Statement and any motion to dismiss or affirm that may be filed.

39. We believe it is clear, however, that neither appeal is moot. Accordingly, all the requisites of appellate jurisdiction under 28 U. S. C. §1257(2) are present and a decision on the merits is required of this Court in both cases.*

The Federal Question Is Substantial.

Since *Pennoyer v. Neff*, 95 U. S. 714, this Court has consistently held that state court judgments are void under the Due Process Clause of the Fourteenth Amendment if rendered without jurisdiction over either the person or the property of the defendant. In the recent case of *McGee v. International Life Ins. Co.*, 355 U. S. — (No. 50, O.T. 1957), this Court redefined the limitations imposed by the Due Process Clause on the power of state

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*Out of an abundance of caution, appellants wish to state their views as to the appropriate course of action for this Court in the event of a decision by it that these appeals are improvidently taken.

Should this Court dismiss these appeals as improvidently taken and then deny certiorari pursuant to 28 U. S. C. §2103, thus allowing the judgments below to become final, the California courts may hold that further consideration of the constitutional issue in the basic actions is precluded by the doctrine of *res judicata*. There is some indication that review by this Court of the constitutional issue could not then be had because of the existence of an adequate state ground for the decision below. *Cf. Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44. But in the absence of a decision on the merits by this Court, Rosenbaum would still be free to contend in New York (in an action which he has already commenced for a declaratory judgment against appellants and the class represented by appellees) that any final judgment in California which may be rendered in favor of appellees is void for lack of jurisdiction over him. Should he prevail, appellants would be compelled to pay twice an amount for which they can be justly liable but once. Accordingly, if this Court should be disposed to dismiss the appeals, it is requested that the Court either (1) grant a writ of certiorari pursuant to 28 U. S. C. §2103; or (2) continue these cases on the docket pending disposition of the basic actions (*cf. Land v. Dollar*, 341 U. S. 737); or (3) deny the writ "without prejudice" to further consideration of the constitutional issue if raised in subsequent proceedings.

courts to exercise *personal* jurisdiction without service of process within their boundaries. In the cases at bar, however, as the court below noted in its opinion [App. A, p. 9], it is beyond dispute that jurisdiction over the *person* of Samuel R. Rosenbaum, an indispensable party, is lacking under the statutes of California.* The sole issue in these cases, therefore, is whether California has such jurisdiction over Rosenbaum's *property* as to justify an assertion of power to adjudicate his rights therein.

It is entirely clear that state courts have jurisdiction to determine the rights of absent parties in any *tangible* property which is physically located within the state. The "property" in question in this case, however, is *intangible* property having no physical existence and hence no location. In cases involving intangible property, this Court has long held that where a debtor owes money to an absent creditor and where a court has personal jurisdiction over the debtor, such court may, through procedures such as garnishment and escheat, adjudicate plaintiff's rights against the absent creditor to the extent of the indebtedness. See *e.g., Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710; *Harris v. Balk*, 198 U. S. 215; *Pennington v. Fourth National Bank*, 243 U. S. 269; *Security Savings Bank v. California*, 263 U. S. 282; *Standard Oil Co. v. New Jersey*, 341 U. S. 428. The rationale of such cases is that a plaintiff garnishor or escheat claimant who can secure jurisdiction over the person of a party who is obligated to the absent defendant, and thereafter can reduce the intangible property to possession by compelling payment on behalf of the

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*See Section 417 of the California Code of Civil Procedure, reprinted in Appendix C, *infra*.

absent defendant, can then proceed to assert his claims against that defendant as if he had in the first instance attached that defendant's tangible property within the state. Under such procedures, a state court can validly adjudicate the rights of the defendant although it has no jurisdiction whatever over his person, and the decision will be conclusive to the extent of his interest in the property garnisheed or escheated.

Although appellees in these proceedings have relied in all the courts below on the above cited cases, the slightest inspection of them shows that they are not in point. They hold that jurisdiction to determine the rights of a defendant over whom a state court has no personal jurisdiction can be secured *if* the local plaintiff alleges and proves that the absent party has a valid, recoverable claim against a party who is personally before the court, and hence has "property" within the state which can be subjected to local claims. The appellees in the cases at bar allege the opposite: that Rosenbaum, the absent defendant, has no rights whatever in the intangible property involved and hence has no property within the state on which a judgment can operate. The purpose of their action is to secure an adjudication that appellants are *not* indebted to Rosenbaum, but are, instead, indebted to them. As the court below said, "Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them *instead of* to the trustee." (Emphasis supplied) [App. A, p. 5.]

The decision of the court below that Section 412 of the California Code of Civil Procedure is constitutional as applied, and hence that appellees' actions can be maintained, is not only without support in the relevant per-

missive decisions of this Court but is squarely in conflict with the decisions in *New York Life Ins. Co. v. Dunlevy,* 241 U. S. 518; *Bank of Jasper v. First National Bank,* 258 U. S. 112; *Estin v. Estin,* 334 U. S. 541, and *Vanderbilt v. Vanderbilt,* 354 U. S. 416. In each of these four cases, a state court had jurisdiction over the person of an alleged debtor. In each, jurisdiction over the person of the defendant creditor was lacking. In each, the relief sought by the party attempting to sustain the jurisdiction was an adjudication that the absent creditor had no rights in the intangible property in question. In all four cases this Court held squarely that a judgment purporting to establish that an absent party has no intangible property rights against an alleged debtor is necessarily personal in character, and hence is void under the Fourteenth Amendment in the absence of personal jurisdiction over the absent party.

The grounds on which the court below sought to distinguish the cases cited are untenable. The *Dunlevy, Estin* and *Vanderbilt* cases were distinguishable, it said, because in each the proceedings were instituted by the debtor in a forum of his own choice rather than by a party asserting a claim to the debt. This assertion is inaccurate as to the *Dunlevy* case, for there, local creditors of the absent party, Mrs. Dunlevy, caused a garnishment to be levied upon the basis of which a rule to show cause was issued against the insurance company and the two insurance policy claimants—Mrs. Dunlevy and a Mr. Gould—for the purpose of having adjudicated the ownership of the policy. In response to the rule to show cause, the insurance company filed its bill of interpleader. See *New York Life Ins. Co. v. Dunlevy,* 214 Fed. 1, 5-6 (9th Cir.). Therefore, the forum was chosen not by the debtor but by Mrs. Dunlevy's

creditors.* Moreover, in each of the three cases it is clear that the identity of the party initiating the suit was deemed irrelevant, and that the effect of the judgment sought on the absent party was deemed decisive. See particularly *Estin v. Estin, supra,* 334 U. S., at 548. It can make no conceivable difference whether proceedings against an absent defendant are instituted by an adverse claimant, as in *Bank of Jasper*** and the cases at bar; by a stakeholder, as the court below thought was the case in *Dunlevy;* or by the debtor, as in *Estin* and *Vanderbilt.* In any such case the proceeding is instituted by a party who is either hostile or indifferent to the absent party's rights and would not be likely to consult him in choosing a forum.

The court below sought to distinguish *Bank of Jasper v. First National Bank,* 258 U. S. 112, on the ground that there a negotiable instrument was involved. The reading of

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*The opinion of the court below also appears to suggest that the *Dunlevy* decision rested on state grounds [App. A, p. 6]. However, the *Dunlevy* opinion indicates beyond all question that the reference to state law went to an altogether different problem, *i.e.,* whether the Pennsylvania court in the garnishment-interpleader proceedings had jurisdiction over the *person* of Mrs. Dunlevy by virtue of the fact that she had been personally served in a prior action by which the garnishors had reduced their original claim against her to judgment. This Court rejected the claim of *personal* jurisdiction because, as here, it was not supported by the applicable state law. The reference to state law thus had nothing to do with this Court's rejection of the claim of jurisdiction based on *property,* which is in issue on these appeals.

**The *Bank of Jasper* case seems to us identical with the case at bar. There, one Corbett, and others similarly situated, had brought actions in Florida against the Bank of Jasper and three Georgia corporations. Process was served upon the Bank of Jasper in Florida but the three Georgia corporations could not be found within the state and hence were served by publication only. Corbett alleged that he had been fraudulently induced by two of the Georgia corporations, Rome Company and American Company, to purchase shares of their worthless stock; that they had deposited the proceeds in the Bank of Jasper, which had issued negotiable

the decision is clearly erroneous. See Stumberg, Conflict of Laws, p. 110, note 42. This Court noted the negotiable character of the obligation involved in *Bank of Jasper* only to indicate why the plaintiff-claimant had not attempted to assert the absent claimant's rights in the manner permitted by such cases as *Harris v. Balk* and *Pennington v. Fourth National Bank, supra.* In *Bank of Jasper,* the plaintiff could not frame his case in terms of an assertion of the absent claimant's rights because he did not have possession

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certificates of deposit therefor; and that the certificates had been negotiated by the two Georgia corporations to the third Georgia corporation, the First National Bank. The complaint prayed that the proceeds of the stock sales, which had been deposited in the Bank of Jasper, "be impressed with a trust in favor of the complainant; that the First National Bank [the holder of the certificates of deposit] be declared not to have any interest therein; that the certificate of deposit . . . and the contract to purchase the stock, be declared void; . . . [and] that the Jasper bank be restrained from making any payment to the First National Bank out of the proceeds. . . ." 258 U. S., at 115-116. The Florida court rejected the contention of the First National Bank, made upon special appearance, that the substituted service of process upon it was invalid, and entered judgment in favor of Corbett as prayed in the complaint.

Thereafter, the First National Bank brought suit on the certificates of deposit against the Bank of Jasper in a federal court, contending that the Florida judgment was invalid for lack of jurisdiction over its person or property. This Court, in an opinion written by Mr. Justice Brandeis, held that the indebtedness of the Bank of Jasper to the First National Bank could not be considered property within the state for purposes of supporting jurisdiction to determine the rights of the First National Bank, for the obvious reason that Corbett, the claimant, had asked the Florida court to determine that the indebtedness in Florida was *not* its property. Had the indebtedness "rested in open account," the court commented, it

> ". . . would have been property of the creditor within the State of Florida. In an *appropriate proceeding* it might have been reached to satisfy a claim against its owner. *Pennington v. Fourth National Bank,* 243 U. S. 269. But the suits in the state court were not proceedings of that character. *In them the complainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its correspondents, but to the complainant.*" 258 U. S., at 119 (emphasis supplied).

of the negotiable instrument, a prerequisite to recovery under the applicable common law. Here, appellees cannot frame their case in terms of an assertion of the absent claimant's rights because, under the applicable state law, assertion of his rights would require acceptance of his obligation as a trustee to use the amounts involved for the purposes set forth in the trust agreements. See, *e.g.*, *The First National Bank v. Reed,* 198 Cal. 252, 244 Pac. 368; *Liberty Bank v. Nonnenmann,* 96 Cal. App. 478, 274 Pac. 568; *Patterson v. Crowell,* 15 Cal. App. 105, 113 Pac. 700. Since appellees are not qualified to act as trustees and in any event do not seek to exercise a trustee's rights, they do not and cannot frame their case in terms of an assertion of the rights of the absent party. They demand, and must demand, a purely personal judgment against him.

As noted above, appellees cannot obtain a *personal* judgment in California against Rosenbaum. The California Supreme Court held that "since the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him." [App. A, p. 9.] Since the California courts are without power to enter a personal judgment against Rosenbaum, the question of whether there were sufficient "relevant contacts" to support personal jurisdiction under *McGee v. International Life Ins. Co.,* 355 U. S. — (No. 50, O.T. 1957), is not presented.

The California Supreme Court, however, holds that if an absent defendant has "contacts" with the state with respect to a contract right against a local debtor, the state has power, without personal jurisdiction over such defendant, to cancel or invalidate his contract right. But under the decisions of this Court, where there is no personal jurisdiction over a defendant-creditor, a state

court is without power to set aside his rights in intangibles. To hold that such power can be predicated upon "contacts" is inconsistent with the *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt* cases. In each of those cases, this Court struck down the jurisdiction of state courts despite the existence of far more "relevant" contacts with the absent defendant than exist here. In the *Dunlevy* case, the insurance policy was issued to the insured in Pennsylvania, the state which sought to exercise jurisdiction. The insured, in Pennsylvania, assigned his rights in the policy to the absent defendant—Mrs. Dunlevy—at a time when she was a resident of Pennsylvania. See *Dunlevy v. New York Life Ins. Co.*, 204 Fed. 670, 671 (N.D. Cal.). In the *Bank of Jasper* case, the intangible was closely identified with Florida, the state whose courts had attempted to base jurisdiction upon it. The obligation of the Bank of Jasper, the debtor over whom the court had personal jurisdiction, was incurred in Florida and the rights which the complainant was seeking to enforce arose out of a fraud allegedly committed in that state by two of the absent parties. The rights of the third absent party depended upon a certificate of deposit issued in Florida by the Bank of Jasper. In the *Estin* and *Vanderbilt* cases, the "debtor" was domiciled in the forum state, and that state therefore had power to dissolve the very relationship on which the obligation was founded. In all four cases, however, this Court held that the attempted exercise of jurisdiction was improper. The conclusion thus is clear that the decision of the court below is in conflict, both in result and in principle, with decisions of this Court that have been reaffirmed and applied as recently as the 1956 Term.

Under the decisions of this Court, the Due Process Clause of the Fourteenth Amendment precludes a state court from adjudging that a defendant, over whom the

state court has not obtained personal jurisdiction, has no interest in an intangible. The court below has held that the courts of California can constitutionally do the very thing that this Court has held that they cannot constitutionally do—it has held that without having personal jurisdiction over Rosenbaum, the California courts have jurisdiction to adjudge invalid a trust agreement between Rosenbaum and these appellants and to order these appellants to pay to appellees the sums they agreed to pay to Rosenbaum.

Conclusion.

These appeals present a substantial federal question. The *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt* cases have not been overruled and are by no means obsolete. Yet the court below, after suggesting some distinctions that do not exist and others that are immaterial, intimated that the *Dunlevy* case was no longer controlling, blandly asserting that it was "not required to forecast the overruling of the Dunlevy case." [App. A, p. 12.] We believe that the California Supreme Court erred in failing to acknowledge the binding effect of this Court's decisions.

The constitutional question presented herein is obviously of general importance, because the principles established by the *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt* cases now form the basis of statutes and case law relating to jurisdiction in many states. In addition, an authoritative decision by this Court on these appeals is of particular importance to these appellants. The decision below holds that California has power to render judgments requiring appellants to pay money to appellees rather than to Rosenbaum, as trustee. The decision is not, however, binding on the courts of New

York, in which Rosenbaum has already commenced an action against these appellants. The New York courts can be expected to adhere to the principles of *Dunlevy, Bank of Jasper, Estin* and *Vanderbilt*, and in reliance upon those cases to treat any California decision as a nullity. The result then can be that appellants will be required to pay twice—once to appellees as may be required by a California judgment, and once to Rosenbaum as may be required by a New York judgment.

The decision below is final as to appellants, and the issue presented by these appeals should be decided now by a Court whose decisions are binding on the courts of both New York and California.

Respectfully submitted,

HOMER I. MITCHELL,
CHARLES G. BAKALY, JR.,
Attorneys for Columbia Broadcasting System, Inc., CBS Television Film Sales, Inc., Radio Corporation of America, National Broadcasting Company, Inc., California National Productions, Inc., and Capitol Records, Inc.

O'MELVENY & MYERS,
Of Counsel.

ALFRED I. ROTHMAN,
Attorney for Loew's Incorporated, Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television Service, Inc.

LOEB & LOEB,
Of Counsel.

AVERILL C. PASAROW,
Attorney for Decca Records, Inc. and Coral Records, Inc.

Dated January 29, 1958.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

William (Bill) Atkinson, Jack Barsby, Alfred E. Brain, Clarence (Pete) Carpenter, Russell A. Cheever, Harriet Crawford, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loews Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24629.

John H. Anderson, Jr., Burnett F. Atkinson, Robert Bain, Edwin Vance Beach, Roland E. Bundock, Lawrence B. Bunker, George Callender, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loews Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24630.

Filed: Nov. 5, 1957.

Separate class actions were brought by two groups of musicians attacking the validity of collective bargaining contracts between their employers and the American Federation of Musicians and certain trust agreements related thereto. One action is on behalf of the employees of various motion picture companies and the other is on behalf of the employees of various phonograph record com-

panies. The gist of plaintiffs' complaints is that in violation of its duty as their collective bargaining agent and in fraud of their rights the Federation contracted with the employers that certain royalty payments and payments for reuse of motion pictures on television should be paid to a trustee for specified trust purposes instead of to the employees.

Plaintiffs allege that these payments constitute wages earned by the employees and that their diversion to the trust is violative of their rights; that the purpose of the trust is to contribute to the public knowledge and appreciation of music throughout the United States and Canada, and the trustee is authorized and directed to expend the trust funds in presenting personal performances by instrumental musicians to which the public is admitted without charge; that the trust arrangement diverts wages earned by California employees, members of Local No. 47, for the benefit of Federation members elsewhere without corresponding benefit to plaintiffs from the operation of similar arrangements made elsewhere; that the employers are willing to make the payments to their employees, but for their agreements with the Federation to make the payments to the trustee; and that the national executive officers of the Federation insisted on this arrangement for the selfish purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation and used the trust fund to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber plaintiffs and are not employed by the employers here involved.

In each action, the Federation, the trustee, and the respective employers are named as defendants. Plain-

tiffs seek a declaration of the invalidity of the collective bargaining agreement and their right to the payments either as beneficiaries of a constructive trust or on the ground that the payments constitute wages withheld in violation of sections 222 and 224 of the Labor Code. They also seek damages against the Federation for breach of its duty to them. At the commencement of the actions they moved for the appointment of a receiver to collect the payments and preliminary injunctions to prevent the employers from making the payments to the trustee. The employers have been personally served with process in this state, and personal jurisdiction has been obtained over the Federation. The trustee was served pursuant to court order by delivery of summonses and complaints and motion papers within the State of New York, but he has not appeared.

The trial court held that insofar as plaintiffs sought to intercept the delivery of payments to the trustee by the appointment of a receiver and temporary injunctions, the trustee was an indispensable party and that the court had no jurisdiction to grant plaintiffs' motions for provisional relief without personal jurisdiction over the trustee. It was careful to point out that its ruling was based solely on lack of jurisdiction and stated that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver . . ."

Some of the plaintiffs in each of the actions then filed their petitions for writs of mandate in the District Court of Appeal, Second Appellate District. The Second Division of that court issued alternative writs of mandate and after a hearing filed its decision in each case "com-

manding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein." Petitions for hearing by the real parties in interest, the defendant employers and Federation, were then granted by this court.

The writ of mandate is an appropriate remedy unless an appeal from each order denying the motion for a preliminary injunction constitutes "a plain, speedy, and adequate remedy." (Code Civ. Proc., § 1086; Financial Indem. Co. v. Superior Court, 45 Cal. 2d 395, 399.) Petitioners alleged in their petitions before the District Court that the remedy by appeal was not adequate because of the necessity of prompt action to prevent further movement of funds out of the jurisdiction of the superior court. Since no purpose but delay would be served at this time by reviewing the District Court's decision that the remedy by appeal was inadequate, we accept it for the purposes of these proceedings. (Bowles v. Superior Court, 44 Cal. 2d 574, 582.)

We have concluded that personal service upon the trustee in New York was sufficient to give the court jurisdiction to adjudicate his right to receive payments under the contracts here involved. Code of Civil Procedure section 412 provides: "Where the person on whom service is to be made resides out of the State . . . and it . . . appears . . . that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consist wholly or in part in excluding such person . . . from any interest therein, such court, or judge, may make an order

that the service be made by the publication of the summons." Section 413 provides that personal service outside the state is equivalent to publication. Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them instead of to the trustee. That obligation is a chose in action and is therefore personal property within the meaning of the statutory provisions. (Code Civ. Proc., § 17 (3).) Being an intangible, it has no situs in fact. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (Estate of Waits, 23 Cal. 2d 676, 680.) The question presented, therefore, is whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions.

Plaintiffs rely on cases holding that having jurisdiction over the obligor, the state has power to enforce the obligation and cut off the right, if any, of a nonresident claimant thereto without personal jurisdiction over the nonresident. Garnishment proceedings (Harris v. Balk, 198 U. S. 215) and escheat proceedings (Standard Oil Co. v. New Jersey, 341 U. S. 428; Security Bank v. California, 263 U. S. 282) are examples of the exercise of such power. Defendants contend, however, that in the case of ordinary choses in action such power is limited to situations in which the local claimant admits the validity of the local debtor's obligation to the nonresident and seeks to reach the interest he admits is the property of the nonresident. They point out that in the present case plaintiffs are not seeking to reach property

admittedly belonging to the trustee but are claiming that the obligation is owed only to them. Defendants rely on cases holding that the debtor cannot treat his own obligation as property where he is, when his purpose is to terminate a nonresident's claim against him (Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360; Estin v. Estin, 334 U. S. 541); and they contend that the rule is the same when the debtor seeks to interplead both a local and a nonresident claimant. (N. Y. Life Ins. Co. v. Dunlevy, 241 U. S. 518.) In their view it is immaterial in an action to adjudicate conflicting claims to an obligation, whether the action is commenced by the obligor, where only one of the claimants can be served, or is commenced by one of the claimants, where he can secure personal jurisdiction over the obligor but not over the rival claimant.

We find no controlling precedent of the United States Supreme Court. It is true that in the Dunlevy case creditors of one of the claimants to the insurance proceeds had garnished Mrs. Dunlevy's interest before the insurance company sought to interplead the local claimants with Mrs. Dunlevy who was absent, but the Court was careful to point out that the interpleader action "initiated by the company was an altogether different matter" from the garnishment proceedings and that under the applicable state law a judgment exonerating the garnishee was not binding on the absent debtor whose claim against the garnishee the local creditors had unsuccessfully attempted to reach. (241 U. S. 518, 520-521.) Defendants rely on language in Bank of Jasper v. First National Bank, 258 U. S. 112, 118-119, suggesting a distinction for jurisdictional purposes between an action to reach a debt owed an absent defendant and an action seeking to establish

that the debt is owed directly to the plaintiff instead of to the absent claimant. In the Bank of Jasper case, however, the obligation had been embodied in a negotiable certificate of deposit that was not within the jurisdiction of the court, and the Supreme Court summarized its holding by stating that "As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." Accordingly, that case is not controlling here where the obligation has not been embodied in a negotiable document.

Decisions of other courts involving conflicting claims to choses in action, where the action has been commenced by one claimant who has secured personal jurisdiction over the debtor but not over the absent claimant, are in conflict as to whether there is jurisdiction to adjudicate the absent claimant's rights. (See, *e.g.*, sustaining or indicating jurisdiction: Cameron v. Penn. Mut. Life Ins. Co. [N. J. Eq.], 161 Atl. 55, 60; 173 Atl. 344, 346; Ely v. Hartford Life Ins. Co. [Ky.], 110 S. W. 265, 268; State v. Mueller [Mo. App.], 90 S. W. 2d 171, 174-176; Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d 884, 887-889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N. E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S. W. 881, 882; Taylor v. Security Mut. Life Ins. Co., 77 N. Y. S. 1012, 1013; Oishei v. Pennsylvania R. Co., 102 N. Y. S. 368, 371, aff'd, 85 N. E. 1113; Morgan v. Mutual Benefit Life Ins. Co. [N. Y.], 82 N. E. 438, 441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Bush v. Missouri State Life Ins. Co. [Okla.], 207 Pac. 317, 319; Mutual

Home Assn. v. Zwatchka [Tex. Civ. App.], 297 S. W. 317, 318; Perry v. Young [Tenn.], 182 S. W. 577, 578; Sherman Nat. Bank v. Shubert Theatrical Co., 238 Fed. 225, 229; Morgan v. Mutual etc. Ins. Co., 16 Cal. App. 85, 90-93. Denying or indicating no jurisdiction: Mahr *et al.* v. N. U. F. Ins. Soc., 127 N. Y. 452, 460-462; Kelly v. Norwich Union Fire Ins. Co. [Iowa], 47 N. W. 986, 987; Royal Neighbors of America v. Fletcher [Okla.], 227 Pac. 426, 429; Cross v. Armstrong [Ohio], 10 N. E. 160, 164-166; Washington Life Ins. Co. v. Gooding [Tex. Civ. App.], 49 S. W. 123, 127; Redzina v. Provident Inst. for Savings [N. J.], 125 Atl. 133, 136; McBride v. Garland [N. J. Eq.], 104 Atl. 435, 436; Austin v. Royal League [Ill.], 147 N. E. 106, 109; Schoenholz v. New York Life Ins. Co., 188 N. Y. S. 596; Eisner v. Williams [Mich.], 298 N. W. 507, 509-510; Stockbridge v. Phoenix Mut. Life Ins. Co., 193 Fed. 558, 560.)

In the absence of a settled rule governing the situation before us, and in light of the fact that an intangible may be subjected to the jurisdiction of the court without personal jurisdiction over all of the parties involved for some purposes but not for others, we conclude that the solution must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles.

It is significant that with respect to jurisdiction to tax intangibles (Curry v. McCanless, 307 U. S. 357, 373-374), jurisdiction over foreign corporations (Internat. Shoe Co. v. Washington, 326 U. S. 310, 316; Perkins v. Benguet Mining Co., 342 U. S. 437, 445), and jurisdiction to adjudicate trust obligations (Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 311-

313), emphasis is no longer placed on actual or physical presence but on the bearing that local contracts have to the question of overall fair play and substantial justice. A similar change in emphasis has been taking place with respect to personal jurisdiction over individuals. (*Cf.*, Pennoyer v. Neff, 95 U. S. 714; with Milliken v. Meyer, 311 U. S. 457, 462-463; Hess v. Pawloski, 274 U. S. 352; Allen v. Superior Court, 41 Cal. 2d 306, 310-313; Nelson v. Miller [Ill.], 143 N. E. 2d 673; see, Smyth v. Twin State Improvement Corp. [Vt.], 80 Atl. 2d 664.) "But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Internat. Shoe Co. v. Washington, *supra*, 326 U. S. 310, 316.)

In the present case, since the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him, and it is therefore unnecessary to determine whether his activities as trustee have sufficient connection with this state constitutionally to justify an assumption of personal jurisdiction without service of process here. The relevant contacts with this state are significant, however, in deciding whether due process permits exercising a more limited or quasi in rem jurisdiction to determine his and plaintiffs' interests in the intangibles in question.

We find no relevance in the distinction defendants seek to make between jurisdiction to take over a nonresident's

claim to a chose in action admittedly his and jurisdiction to establish that it was never his. In both situations the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court. It is true that in the former situation he must litigate a controversy solely between himself and his creditor unrelated to pre-existing rights in the obligation garnished, whereas in the latter situation pre-existing conflicting rights to the obligation itself are involved; but this distinction alone has no bearing on the fairness of making him appear. It has been rejected in a case involving both real and personal property including intangibles (Loaiza v. Superior Court, 85 Cal. 11, 34-35), and does not exist with respect to controversies over corporate stock. (Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 12-13; Wait v. Kern River Mining etc. Co., 157 Cal. 16, 21; Amparo Mining Co. v. Fidelity Trust Co. [N. J.], 73 Atl. 249, 250-251; Michigan Trust Co. v. Probasco [Ind. App.], 63 N. E. 255, 257.) It is true that for some purposes the state of incorporation may be peculiarly appropriate for the purpose of litigating conflicting claims to corporate stock, but if so, it is because of relevant contacts there; if such contacts exist elsewhere, jurisdiction also follows. (Wait v. Kern River Mining etc. Co., *supra*, 157 Cal. 16, 21.) Similarly, in the case of other intangibles, jurisdiction must be determined in the light of the totality of contacts with the state involved. Indeed, many of the apparently conflicting decisions on the question before us could be reconciled on their facts, if not their language, on this basis. (*Cf.*, *e.g.*, Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d 884, 887-889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N. E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S. W. 881,

882, Morgan v. Mutual Benefit Life Ins. Co. [N. Y.], 82 N. E. 438, 440-441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Perry v. Young [Tenn.], 182 S. W. 577, 578; with Mahr *et al.* v. N. U. F. Ins. Soc., 127 N. Y. 452, 460-462; Cross v. Armstrong [Ohio], 10 N. E. 160, 164; Eisner v. Williams [Mich.], 298 N. W. 507, 509-510.)

The present case is not one in which an obligor has invoked the jurisdiction of a court remote from the obligee solely for the purpose of terminating his obligation (see, Estin v. Estin, *supra;* Vanderbilt v. Vanderbilt, *supra*) or sought to compel conflicting claimants to adjudicate their rights in a forum of his own choice. (See, N. Y. Life Ins. Co. v. Dunlevy, *supra.*) The obligation plaintiffs seek to enforce grows out of their employment by defendants here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state. Moreover, fairness to the defendants who are personally before the court also demands that the conflicting claims of the trustee be subject to final adjudication. Even if we were to hold that his absence prevents the granting of the provisional remedies here sought, plaintiffs would not be foreclosed thereby from asserting that payment to him did not discharge the employers' obligation to them and that the Federation was independently liable for damages for breach of its fiduciary duty. The evil of exposing the obligor to actions to enforce the same obligation in two jurisdictions with the attendant risk of double liability would not be obviated. It was just such double liability

that was sustained in the Dunlevy case and gave impetus to the passage of federal interpleader legislation. (See, Chafee, Interstate Interpleader, 33 Yale L. J. 685, 711.) It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead. To sustain jurisdiction in these cases, however, we are not required to forecast the overruling of the Dunlevy case and to act on that basis. For the reasons stated above, this case is clearly distinguishable from the Dunlevy case, and the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for a preliminary injunction and the appointment of a receiver as prayed herein.

TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*

SHENK, *J.*

CARTER, *J.*

SCHAUER, *J.*

SPENCE, *J.*

MC COMB, *J.*

APPENDIX B.

Memorandum for Counsel.

In the Superior Court of the State of California, in and for the County of Los Angeles.

John H. Anderson, Jr., *et al.*, Plaintiffs, vs. American Federation of Musicians of The United States and Canada, an unincorporated association and labor union, *et al.*, Defendants. No. 669,990.

William (Bill) Atkinson, *et al.*, Plaintiffs, vs. American Federation of Musicians of The United States and Canada, an unincorporated association and labor union, *et al.*, Defendants. No. 670,348.

A brief memorandum will be sufficient to indicate to counsel the basis of the court's determination in each case.

While there are a number of causes of action in each complaint, including claims of plaintiffs for damages as against the defendant Federation, the matters presently before the court with respect to the applications for preliminary injunctions and for appointment of a receiver fall within a narrower compass. The question first to be determined is that of jurisdiction and that problem is rooted in the contention of the plaintiffs that they, or persons whom they represent, are entitled to receive moneys payable by various defendants in the phonograph-record or television-film fields under certain agreements. The plaintiffs seek to enjoin those defendants from making payments of the moneys so claimed by the plaintiffs to the trustee of the Music Performance Trust Funds.

The trustee, Mr. Rosenbaum, although named as a party defendant in each case, cannot be personally served with process in this State, but is to be found in the State of New York. In view of that fact, does this court have

jurisdiction to grant an injunction or appoint a receiver as sought by the plaintiffs? In seeking an answer to that question, some guidance is found in an article by Fletcher B. Andrews in 49 Yale Law Journal at page 241 (reprinted in part in Selected Readings on Conflict of Laws at page 306), the article being entitled "Situs of Intangibles in Suits Against Non-resident Claimants". Certain distinctions are to be noted. The cases at bar do not involve the interpleader problem (New York Life Insurance Company v. Dunlevy, 241 U. S. 518). Moreover, there is not presented a case in which a plaintiff seeks to have applied, in satisfaction of an obligation owed to him by a non-resident, property of the non-resident in the form of a debt owed the latter by a debtor upon whom the plaintiff is able to obtain personal service of process (Harris v. Balk, 198 U. S. 215). The problem is, rather, that of conflicting claims to a debt owed or an intangible obligation for the payment of money undertaken by a third person. While the authorities are not consistent and while there has been no direct determination of the question by the Supreme Court of the United States, the sound view under the facts here presented appears to be that there is no jurisdiction to resolve the conflicting claims unless jurisdiction *in personam* can be obtained over each claimant.

If the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and, perhaps, the appointment of a receiver, at least with respect to the 10 percent and 21 percent payments under schedule "A" of the labor agreement in the Anderson case and with respect to the re-use payments in the Atkinson case. However, as set forth above, such jurisdiction does not exist.

Because the trustee, who is an indispensable party in the phase of each case under examination, is not subject to the process of the court, each application for a preliminary injunction and for a receiver will be denied *solely* upon the ground of lack of jurisdiction in the court. Counsel for the defendant Federation are requested to prepare a formal order in each case. The temporary restraining orders will not be dissolved until the court signs the formal orders to be submitted, or, with respect to the temporary restraining order in the Atkinson case, unless it shall expire prior thereto by its own terms.

Dated this 24th day of January, 1957.

JOHN J. FORD
Judge of the Superior Court

APPENDIX C.

Cal. Stat. 1951, ch. 1737, §48, West's Ann. Cal. Codes, Code Civ. Proc., §412:

"Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consist wholly or in part in excluding such person or corporation from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons."

Cal. Stat. 1951, ch. 43, §1, West's Ann. Cal. Codes, Code Civ. Proc., §413:

"The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week; but publication against a defendant re-

siding out of the State, or absent therefrom, must be pursuant to Section 6065 of the Government Code, except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3, of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon the making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur.

"As used in this section 'post office' includes mail box, sub-post office, substation and mail chute or other like facility regularly maintained by the Government of the United States."

Cal. Stat. 1951, ch. 935, §1, West's Ann. Cal. Codes, Code Civ. Proc., §417:

"Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."

APPENDIX D.

Writs of Mandate.

In the Supreme Court of the State of California.

William (Bill) Atkinson, Jack Barsby, Alfred E. Brain, Clarence (Pete) Carpenter, Russell A. Cheever, Harriet Crawford, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loews Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24629.

WRIT OF MANDATE

The People of the State of California Send Greetings to the Respondent, the Superior Court of the State of California, in and for the County of Los Angeles:

Whereas, the Supreme Court of the State of California, *in bank*, on November 5, 1957, unanimously ordered a writ of mandate to issue in the above entitled proceeding as prayed for in the petition for writ of mandate on file herein; now, therefore,

You are hereby commanded to assume and exercise jurisdiction over plaintiffs' (petitioners') application for preliminary injunction and the appointment of a receiver in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered 670348, entitled William (Bill) Atkinson, *et al.*; Plaintiffs, v. American Federation of Musicians of the United States and Canada, etc., *et al.*, Defendants.

Witness the Honorable Phil S. Gibson, Chief Justice, and all of the Associate Justices of the Supreme Court of the State of California.

Attest my hand and the seal of this Court, this 6th day of December, 1957.

WILLIAM I. SULLIVAN,
Clerk of the Supreme Court
By _____
Deputy Clerk

In the Supreme Court of the State of California.

John H. Anderson, Jr., Burnett F. Atkinson, Robert Bain, Edwin Vance Beach, Roland E. Bundock, Lawrence B. Bunker, George Callender, individually and on behalf of all other instrumental musicians similarly situated, Petitioners, vs. The Superior Court of the State of California, in and for the County of Los Angeles, Respondent. American Federation of Musicians, Columbia Broadcasting System, *et al.*, and Loew's Incorporated, Republic Pictures, *et al.*, Real Parties in Interest. L. A. 24630.

WRIT OF MANDATE

The People of the State of California Send Greetings to the Respondent, the Superior Court of the State of California, in and for the County of Los Angeles:

Whereas, the Supreme Court of the State of California, *in bank*, on November 5, 1957, unanimously ordered a writ of mandate to issue in the above entitled proceeding as prayed for in the petition for writ of mandate on file herein; now, therefore,

You are hereby commanded to assume and exercise jurisdiction over plaintiffs' (petitioners') application for preliminary injunction and the appointment of a receiver in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered 669990, entitled John H. Anderson, Jr., *et al.* Plaintiffs, v. American Federation of Musicians of the United States and Canada, etc., *et al.*, Defendants.

Witness the Honorable Phil S. Gibson, Chief Justice, and all of the Associate Justices of the Supreme Court of the State of California.

Attest my hand and the seal of this Court, this 6th day of December, 1957.

WILLIAM I. SULLIVAN,
Clerk of the Supreme Court
By _____
Deputy Clerk